No. 17-3928

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

KAREN P. FERNBACH, Regional Director of Region 2 of the National Labor Relations Board, for and on behalf of the NATIONAL LABOR RELATIONS BOARD,

Plaintiff-Appellant,

v.

ARBOR RECYCLING and ARBOR LOGISTICS, as a Single Employer,

Defendants-Appellees.

ON APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR PLAINTIFF-APPELLANT NATIONAL LABOR RELATIONS BOARD

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I. PRELIMINARY STATEMENT

Karen Fernbach, the Regional Director of Region 2 ("the Director") of the National Labor Relations Board ("the Board") appeals from an order dated September 26, 2017, issued by Judge P. Kevin Castel, United States District Court for the Southern District of New York in Case No. 17-CV-5694, denying in part and granting in part the Director's petition for a

temporary injunction under § 10(j) of the National Labor Relations Act ("the Act"), 29 U.S.C. § 160(j). (A 309-20.)[1]

II. STATEMENT OF JURISDICTION

The district court had subject matter jurisdiction under § 10(j). The district court issued the injunction order on September 26, 2017, and an order amending the injunction on October 10, 2017. (A 309-22.) The Director filed a timely notice of appeal on December 6, 2017. (A 323-24.) This Court has appellate jurisdiction pursuant to 28 U.S.C. §§ 1291 and 1292(a)(1).

III. STATEMENT OF THE ISSUE

The district court found reasonable cause to believe that Arbor Recycling and Arbor Logistics ("Arbor"), a stipulated single employer, interrogated, threatened, engaged in surveillance of, and discriminated against employees in response to an organizing campaign by Amalgamated Local 1931 ("the Union"), and ordered Arbor to cease and desist from similar unfair labor practices in the future. The court, however, refused to order the immediate interim reinstatement of two wrongfully discharged employees. There is evidence that Arbor's actions chilled employee union activities and diminished the Union's campaign, thus thwarting employee

[1] "A" references are to the Appendix filed with the Director's brief.

efforts to organize to collectively bargain with Arbor. Did the district court abuse its discretion in concluding that interim reinstatement was not necessary to prevent irreparable harm to employee rights pending a final Board remedy?

IV. STATEMENT OF THE CASE

The Director filed a petition for a temporary injunction under § 10(j) seeking interim remedies, including reinstatement and a cease and desist order, pending Board adjudication of an administrative complaint. On September 26, 2017, the district court issued an order, as amended on October 10, 2017, granting in part and denying in part the requested relief, specifically denying temporary reinstatement of employees Rafael Guance and Jose Urbaez. The Director appeals from that denial.

A. Background; Arbor Employees Begin a Union Organizing Campaign

Arbor consists of two affiliated businesses that engage in interrelated operations in the collection, transportation, and recycling of plastic, glass, and aluminum. (A 1.) Arbor operates two adjacent facilities in the Bronx. (A 5-7, 49.) At these locations, Arbor employs approximately 18 warehouse workers, 15 drivers, 10 driver helpers, and a single mechanic. (A 9-12.) Employees and managers move between the two buildings by crossing a

public street. Arbor also operates a facility in Bay Shore where it employs 12 warehouse employees, eight drivers, and four driver helpers, with no mechanic. (A 9-12.)

In June 2016, the Union began organizing Arbor's warehouse employees, drivers, driver helpers, and mechanic at all of its facilities. On multiple occasions between June and August 2016, union representatives stood in front of the Bronx facilities or on the corner at the end of the block to speak with employees as they were coming and going from work. (A 19, 22, 24, 74, 119, 121, 123-24, 127.) Specifically, on July 18, union representatives spoke to employees on the corner with at least one Arbor agent and one Arbor manager present. (A 123.) The following day, an Arbor agent made a video recording of union representatives standing on the street in front of the Bronx facility. (A 124-26.) On July 25, when union representatives went to the Bronx facility to talk to night shift employees and set up a table to serve food, an Arbor manager made a video recording of the union representatives talking to employees. (A 128-31.)

On July 27, 2016, the Union filed a representation petition with the Director seeking an election to represent Arbor's employees. (A 255.)

B. Arbor Terminates Guance

Beginning in June 2015, Rafael Guance worked at Arbor first in the warehouse and then as a driver helper with no disciplinary record or reported problems with his performance. (A 21, 44, 46.) In August 2016, Guance talked to union representatives outside the facility and accepted a card that, if he signed and submitted it, would indicate his interest in union representation. Assistant dispatch manager David Vega was standing approximately 20 feet away smoking a cigarette and watching Guance and the union representatives. Although Vega regularly smokes, this was not his usual smoking area. (A 22-27.)

Later that day, Guance spoke to some coworkers about working conditions at Arbor, including the lack of paid vacations and unclean bathrooms. (A 31.) While Guance and his coworkers were talking, Vega approached and told them that they should be careful about signing union cards. (A 33.) Four to five days later, in front of the supervisor's office, Vega again approached Guance and told him that he should be careful about signing a card because it could cause problems for Arbor. (A 33.) In late August, Guance went to dispatch manager David Vallejo's office to ask a question about an invoice. Vallejo asked Guance if he had signed a card and

Guance responded that he had signed one, to which Vallejo replied, "ok."[2] (A 35.)

On September 6, Guance was working with a driver to pick up materials for a client when the driver backed his truck into a cement pillar at the client's entrance, causing damage to the truck. (A 36-37.) Stating that he was worried about losing his job because he had other accidents in the past, the driver suggested that he and Guance lie and state that another truck caused the damage in a hit and run accident. Guance and the driver called Vega and told him about the supposed hit and run. (A 38-40, 149-50.) The driver also filed a police report with that version of events; Guance did not speak to the police. (A 38-39.) When Vega examined the truck the next day, he informed Vallejo that the damage was not consistent with a hit and run. Vallejo questioned Guance, who stuck to the agreed-upon lie. (A 39-40, 137, 150-51.) When Vallejo confronted the driver, he revealed the truth about hitting the pillar. (A 140.) Vallejo fired Guance but not the driver. (A 41, 140-41.)

[2] Guance testified that he mailed his signed card to the Union, but the Union indicated at trial that they did not have it. (A 25, 134.)

C. Arbor Terminates Urbaez

Beginning in June 2015, Jose Urbaez worked for Arbor as the sole mechanic at the Bronx facility where he serviced and repaired 14 trucks. (A 8, 68, 71.) The repair work was extensive enough that Urbaez worked approximately 25 hours of overtime per week. (A 73, 155-69.) Arbor routinely authorized this overtime, giving no indication that Urbaez was working too slowly, and he had no disciplinary record related to his repair work. (A 73, 95, 109, 112, 155-69.)

In early June 2016, Urbaez met with union representatives outside the facility and, on June 2, he signed a union card. (A 74-75, 170.) In July 2016, after hearing that other employees were being questioned about the Union, Urbaez told Vallejo that he had signed a union card and asked if that was a problem. Vallejo stated that it depends on Arbor's point of view. (A 79-81, 113.) Soon thereafter in July, Vallejo criticized Urbaez's work saying that he was taking too long and that he was not going to last long at the job. In that conversation, Vallejo also mentioned that Urbaez had signed a union card. (A 91-93.) During a later July conversation, Vallejo asked Urbaez how much longer Urbaez needed to make certain repairs; Urbaez explained that he was working alone. Vallejo told Urbaez that he could be suspended for signing the union card. (A 94-95.)

Also in July 2016, Urbaez observed Glecio Rodriguez Da Silva, a salaried employee and agent of Arbor, arguing with union representatives in front of Arbor's facility. Da Silva then approached a group of employees, including Urbaez, and told them that they were dumb asses to pay the Union to represent them and that their salaries could be lowered. (A 85-88.) On another day in July, Urbaez was standing with facility manager Wellington Martinez and two other employees discussing the amount of work Urbaez had to finish when Martinez asked if the Union was going to bring food for the employees. Martinez said that one by one, those who signed cards would be out of Arbor. (A 88-90.)

On October 14, Arbor discharged Urbaez. Vallejo told Urbaez, through a translator, that he had to sign a piece of paper that said Urbaez was being discharged because he was not accomplishing his job and because he did not show respect for Vallejo. (A 101-02.) Urbaez refused to sign stating it was not true and questioning the timing of Arbor's actions. Arbor wrote on Urbaez's discharge paperwork that he was terminated for "lack of job performance," having a "negative attitude," and disrespect toward coworkers. (A 153, 171-72.)

D. After Arbor Terminates Guance and Urbaez, the Union Campaign Comes to a Halt

On January 19, 2017, Arbor and the Union entered into a Stipulated Election Agreement for the Board to conduct a representation election to be held among Arbor's employees on February 14. (A 258-61.) In early 2017, Arbor instructed its employees to meet with its labor consultants who told them that the Union was corrupt and would not provide any benefits to them. (A 53-65.)

As the election date approached, the Union began to lose confidence in its level of employee support. Employees stopped talking to union representatives outside on the street near Arbor's facilities. In January 2017, employees in the Bronx pointed to a camera on the building or at managers in front of the building as they walked past representatives without speaking. (A 132-33.) At the Bay Shore facility, employees told union business agent Nora Roa that they were afraid of losing their jobs if they became involved with the Union and that employees were afraid that other employees would report their union activities to Arbor. (A 264.) On February 10, the election was cancelled after the Union requested that the processing of its representation petition be blocked due to the chilling effect of Arbor's actions on employees. (A 253.)

E. Arbor Instructs Remaining Employees to Revoke their Support for the Union

On February 27, a few weeks after the election was cancelled, facility manager Rocco Mongelli told Bay Shore driver Giscard Bourgeios to go to his office and sign a piece of paper. The paper was a petition that Arbor prepared, stating that employees revoked their union support and did not want the Union to represent them. (A 65-66.) Some employees had already signed. (A 67.)

F. The Director Issues an Unfair Labor Practice Complaint and Petitions for Injunctive Relief

Also on February 27, 2017, the Director issued a consolidated complaint alleging that Arbor violated § 8(a)(1) and (3) of the Act by surveilling employees' union activity, interrogating employees about their support for the Union, threatening employees with discharge, loss of wages and hours and unspecified reprisals because of their support for the Union, and by discharging two employees because of their union activity.[3] (A 217-23.) On May 2, the Director amended the complaint to include an additional allegation that Arbor violated § 8(a)(1) by instructing employees to sign a

[3] The complaint is based on several charges filed by the Union from July 19 to December 15, 2016. The complaint also included an allegation that Arbor unlawfully discharged a third employee but the Board's General Counsel later removed that allegation.

petition that revoked their support for the Union. (A 234-41.) A trial on the complaint was held before an administrative law judge from May 22 through May 24, and on July 13. The case remains pending before the administrative law judge.

On July 27, after receiving authorization from the Board, the Director petitioned the U.S. District Court for the Southern District of New York for injunctive relief pursuant to § 10(j) of the Act (A 175-265), predicated on the pending unfair labor practice complaint (A 234-41). The petition alleged, *inter alia*, that there is reasonable cause to believe that the Director will establish before the Board that Arbor violated § 8(a)(1) and (3) by terminating Guance and Urbaez for their support of the union campaign. The petition also alleged that interim relief, including reinstatement of Guance and Urbaez, is just and proper to prevent likely irreparable harm to employees' rights under the Act prior to a final Board order and to preserve the Board's ability to effectively remedy Arbor's unfair labor practices.

G. The District Court Grants Limited Injunctive Relief but Denies the Director's Request for an Order Requiring Arbor to Reinstate the Employees on an Interim Basis

On August 31, the district court held a hearing at which the parties presented oral argument. (A 266-308.) On September 26, based on the oral argument as well as the various briefs, transcripts, and exhibits, including

the record from the administrative proceeding, submitted by the parties, the district court granted in part and denied in part the Director's petition for injunctive relief. The District Court concluded that the Director established that there was reasonable cause to believe that Arbor violated § 8(a)(1) and (3) as alleged in the petition. (A 317-18.) The district court further concluded that Arbor's interrogations, threats, and surveillance in violation of § 8(a)(1) "likely had a chilling effect on unionization among its workforce." (A 318.) The court concluded that "to preserve the status quo" of the workforce's sentiments about unionization as they existed prior to the violations, it was just and proper to enjoin Arbor from these practices. (A 318.) The district court therefore ordered Arbor to cease and desist from engaging in the conduct that violated § 8(a)(1) . It also ordered Arbor to cease and desist from discharging employees in violation of §8(a)(3) . The court further ordered Arbor to post a copy of its Memorandum and Order at all of its facilities.[4] (A 320.)

However, the court denied the Director's request for interim reinstatement of Guance and Urbaez pending final disposition of the underlying unfair labor practice case. (A 319.) The court found that there

[4] In a later order dated October 10, 2017, the court clarified that the posting should be in Spanish and English and that the burden of a competent translator rested with Arbor. (A 321.)

was "no evidence of union activity" by Guance and Urbaez, other than their signing union cards, noting that they were not union organizers or active recruiters of other employees. (A 318.) The court also found "little evidence" that their terminations chilled other employees' union efforts and concluded that their interim reinstatement would not preserve the status quo or prevent irreparable harm. (A 318.) The court further found evidence that their interim reinstatement would impose a "significant hardship" on Arbor. (A 319.) On those bases, the court concluded that it would be "inequitable" to order their interim reinstatement. (A 319.) On December 6, the Director timely filed her notice of appeal from the district court's partial denial of injunctive relief. (A 323-24.)

V. STANDARD OF APPELLATE REVIEW

This Court reviews a district court's determination of whether relief was just and proper for abuse of discretion, "bearing in mind…that a 'judge's discretion is not boundless and must be exercised within the applicable rules of law or equity.'" *Hoffman v. Inn Credible Caterers, Ltd.*, 247 F.3d 360, 364 (2d Cir. 2001) (quoting *Kaynard v. Mego Corp.*, 633 F.2d 1026, 1030 (2d Cir. 1980)). "Abuse of discretion usually consists of reliance upon clearly erroneous findings of fact or the application of an incorrect legal standard." *Int'l Bhd. of Teamsters v. Teamsters Local Union 714*, 109

F.3d 846, 849 (2d Cir. 1997). In considering what "abuse of discretion" means, this Court has observed that when "reviewing the action of a trial court, an appellate court is not limited to reversing only when the lower court's action exceeds any reasonable bounds and to rubber-stamping with the imprimatur of an affirmance when it does not." *Reuters Ltd. v. United Press Int'l, Inc.*, 903 F.2d 904, 907 (2d Cir. 1990) (internal quotation omitted).

VI. SUMMARY OF ARGUMENT

The district court correctly found that, based on record evidence in the case, there is reasonable cause to believe that Arbor committed numerous unfair labor practices. Evidence shows that Arbor repeatedly surveilled and videotaped its employees' union activities and interrogated and threatened them—including with discharge—in the face of a union organizing campaign. Then, Arbor carried out its threats by discharging two union supporters. After that, Arbor unlawfully instructed its employees to sign a petition to revoke their support for the Union. The court properly ordered that Arbor, on an interim basis, cease and desist from its unlawful conduct to preserve the Board's ability to effectively remedy the unfair labor practices.

While the court properly found reasonable cause to believe that Arbor violated the Act, the court abused its discretion in denying the Director's

request for an injunction ordering interim reinstatement of the discharged employees. The court failed to recognize this Court's longstanding principle that the discharge of union supporters likely causes irreparable harm in the form of undermining employee support for a union and diminishing employees' willingness to engage in statutorily protected activity. The court not only disregarded precedent establishing this harm, but compounded its error by giving insufficient weight to the Director's evidence that this harm occurred following the discharges. The discharges caused a marked chilling effect on employees' willingness to even speak to union representatives and employees expressed fear of retaliation for being involved with the Union, causing the Union campaign to eventually sputter. While the court recognized that Arbor's interrogations, surveillance, and threats of retaliation caused this likely irreparable harm to employees' organizing efforts, it inexplicably failed to recognize that the discharges, which made the threats a reality, also contributed to that harm.

The district court instead relied on the fact that Guance and Urbaez, though union supporters, were not union organizers actively recruiting other employees in support of the Union. But this Court has not limited § 10(j) injunctive relief to only ordering temporary reinstatement of employees in leading organizing roles. Rather, under this Court's precedent the crucial

consideration is that the discharge of union supporters, even if they are not leading organizers, has a recognized tendency to chill employee union activity. That tendency was confirmed by the evidence in this case demonstrating that the campaign gradually lost steam due to employee fear of retaliation.

Because it ignored the serious, harmful effect that the two discharges had on employees, the court erroneously balanced the harms to weigh against injunctive relief. Contrary to the district court's conclusion, there is no significant hardship to Arbor from reinstating the employees and any supposed hardship from their interim reinstatement does not outweigh the proven harm to employee organizing efforts. The court's conclusion that interim reinstatement of Guance and Urbaez would be harmful to Arbor cannot be reconciled with the evidence—and the court's own conclusion—that they were treated disparately and would not have been discharged had they not been union supporters. Instead, interim reinstatement of Guance and Urbaez would provide Arbor with the labor of two experienced employees who, until their discharges, had good disciplinary records, and it would not prevent Arbor from enforcing work rules and discipline in a nondiscriminatory manner.

Furthermore, the public interest in enforcing the Act and protecting the collective-bargaining process is likewise eroded when employers can irreparably quash union campaigns by firing employees.

While there is strong cause to believe that the Board will issue a remedial order requiring Arbor to reinstate Guance and Urbaez, in the absence of an interim reinstatement order it will be too late for the Union to regain its lost support, and Arbor will have unlawfully achieved what it sought—a union-free workforce regardless of its employees' wishes, contrary to the purposes of the Act.

VII. ARGUMENT

A. The Applicable § 10(j) Standards

Section 10(j) of the Act authorizes United States district courts to grant temporary injunctions that are "just and proper" pending the Board's resolution of unfair labor practice proceedings. This provision reflects Congress' recognition that, absent interim relief, a respondent in a Board proceeding can often accomplish its unlawful objective before the Board can effectuate legal restraints. *See Kreisberg v. HealthBridge Mgmt., LLC*, 732 F.3d 131, 143 (2d Cir. 2013); *Seeler v. Trading Port, Inc.*, 517 F.2d 33, 38 (2d Cir. 1975), citing S. Rep. No. 105, 80th Cong., 1st Sess., 8, (1947), cited in Legislative History of the Labor Management Relations Act, 1947, 414,

(1948). Thus, § 10(j) was intended to prevent the frustration or nullification of the Board's remedial authority caused by the passage of time inherent in Board administrative litigation. *See, e.g.*, *Seeler*, 517 F.2d at 37-38.

To resolve a § 10(j) petition, a district court in the Second Circuit considers whether there is "reasonable cause to believe" that a respondent has committed unfair labor practices in violation of the Act, and whether temporary injunctive relief is "just and proper" under the circumstances. *See, e.g.*, *Paulsen v. Remington Lodging & Hospitality, LLC*, 773 F.3d 462, 468-69 (2d Cir. 2014); *Kreisberg*, 732 F.3d at 141-42 (quoting *Hoffman*, 247 F.3d at 364-65).

1. The "reasonable cause" standard

In determining whether there is reasonable cause to believe that the Act has been violated, a district court should not decide the merits of the case and should "give considerable deference to the NLRB Regional Director." *Hoffman*, 247 F.3d at 365. *Accord Remington Lodging*, 773 F.3d at 469. Rather, the court's role is limited to determining whether there is "reasonable cause to believe that a Board decision finding an unfair labor practice will be enforced by a Court of Appeals." *Mego Corp.*, 633 F.2d at 1033 (quoting *McLeod v. Bus. Mach. & Office Appliance Mech. Conference Bd.*, 300 F.2d 237, 242 n.17 (2d Cir. 1962)). District courts hearing § 10(j)

injunction petitions are not to resolve contested factual issues. *See Kaynard v. Palby Lingerie*, 625 F.2d 1047, 1051-52 n.5 (2d Cir. 1980); *NLRB v. Electro-Voice, Inc.*, 83 F.3d 1559, 1570-71 (7th Cir. 1996). Instead, a Regional Director's version of the facts "should be given the benefit of the doubt." *Hoffman*, 247 F.3d at 365 (quoting *Palby Lingerie*, 625 F.2d at 1051). The court should draw all factual inferences in favor of the Regional Director and accept her account of events so long as it is "within the range of rationality." *Mego Corp.*, 633 F.2d at 1031.

Similarly, on questions of law, the district court "should be hospitable to the views of the [Regional Director], however novel." *Id.* (quoting *Danielson v. Jt. Bd. of Coat, Suit & Allied Garment Workers' Union, I.L.G.W.U.*, 494 F.2d 1230, 1245 (2d Cir. 1974)). The Regional Director's legal position should be sustained "unless the [district] court is convinced that it is wrong." *Hoffman*, 247 F.3d at 365 (quoting *Palby Lingerie*, 625 F.2d at 1051). In sum "appropriate deference must be shown to the judgment of the NLRB, and a district court should decline to grant relief only if convinced that the NLRB's legal or factual theories are fatally flawed." *Silverman v. Major League Baseball Player Relations Comm.*, 67 F.3d 1054, 1059 (2d Cir. 1995).

2. The "just and proper" standard

Once reasonable cause is established, § 10(j) relief is "just and proper" when it is "necessary to prevent irreparable harm or to preserve the status quo." *Hoffman*, 247 F.3d at 368. In determining whether temporary relief is "just and proper," courts apply traditional equitable principles, "mindful to apply them in the context of federal labor laws." *Kreisberg*, 732 F.3d at 141 (quoting *Hoffman*, 247 F.3d at 368). As this Court has specifically stated, the focus in the "just and proper" analysis "should be on harm to organizational efforts…delay is a significant concern because the absence of employees who support a union can quickly extinguish organizational efforts and reinforce fears within the workforce concerning the consequences of supporting a unionization campaign." *Remington Lodging*, 773 F.3d at 469. This can include where the unfair labor practices threaten to render the Board's processes ineffective by precluding a meaningful final remedy (*Mego*, 633 F.2d at 1034); where interim relief is the only effective means to preserve or restore the status quo as it existed before the violations (*Seeler*, 517 F.2d at 38); or where the passage of time might otherwise allow the respondent to accomplish its unlawful objective before being placed under any legal restraint (*Palby Lingerie*, 625 F.2d at 1055). *Accord Silverman v. Major League Baseball Player Relations*

Comm., 880 F. Supp. 246, 255 (S.D.N.Y.), *affirmed*, 67 F.3d 1054 (2d Cir. 1995) .

B. The District Court Properly Found Reasonable Cause To Believe that Arbor Violated § 8(a)(1) and (3)

1. There is strong cause to believe that Arbor unlawfully surveilled and interrogated employees about union activities, threatened employees with discharge, loss of wages, and other reprisals, and instructed employees to sign documents to revoke their support for the Union

Section 7 of the Act guarantees employees the right "to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection …." 29 U.S.C. § 157. Section 8(a)(1) of the Act makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7." 29 U.S.C. § 158(a)(1).

The district court properly found that there is reasonable cause to believe that Arbor engaged in various unlawful acts of surveillance of its employees' union activities, including watching and videotaping employees as they spoke to union representatives and obtained and signed union authorization cards. *See NLRB v. Nueva Eng'g, Inc.*, 761 F.2d 961, 967 (4th Cir. 1985) ("So long as the employer watches employees believed to be

engaged in union activities, the interference with statutory rights will follow."); *Partylite Worldwide*, 344 NLRB 1342, 1342 (2005) ("out of the ordinary" observation of employee activity violates § 8(a)(1) even when conducted in open view on employer premises). In particular, employer videotaping or photographing of employees engaged in protected activity is unlawful because it has a tendency to intimidate employees, breed fear of future reprisals, and otherwise interfere with the exercise of Section 7 rights. *Center Constr. Co.*, 345 NLRB 729, 744 (2005), *enforced*, 482 F.3d 425 (6th Cir. 2007).

The district court properly found that there is reasonable cause to believe that Arbor unlawfully interrogated and threatened employees about their union activities. The evidence shows that Arbor's supervisors and agents interrogated employees about their support for the Union and repeatedly threatened them that their support for the Union could cause problems including loss in wages and discharge. (A 32-35, 80-81, 88, 91-93, 98-99). Threats or coercive interrogations of employees concerning their union activities violate § 8(a)(1) . *See NLRB v. Special Touch Home Care Serv., Inc.*, 566 F.3d 292, 301 (2d Cir. 2009); *NLRB v. Solboro Knitting Mills, Inc.*, 572 F.2d 936, 939-40 (2d Cir. 1978) (questioning employees as to whether they wanted to join a union was unlawful where no explanation

of inquiry was given). Often this questioning occurred in private conversations with no assurances against reprisal, thereby adding to the coercive nature. *See NLRB v. J. Coty Messenger Serv., Inc.*, 763 F.2d 92, 98 (2d Cir. 1985). It is also well-settled that an employer violates § 8(a)(1) by threatening to discharge employees for engaging in union activity. *HarperCollins San Francisco v. NLRB*, 79 F.3d 1324, 1329 (2d Cir.1996); *NLRB v. Gordon*, 792 F.2d 29, 32 (2d Cir. 1986).

Finally, there is reasonable cause to believe that, even after the election was cancelled, Arbor violated § 8(a)(1) of the Act by coercing employees to sign a petition revoking their support for the Union. Arbor put on no witnesses or evidence during the administrative trial to refute employee Bourgeois's account (A 65-66) of such coercion by a manager or to explain the document (A 154) that was entered into evidence.

2. There is strong cause to believe that Arbor discharged Guance and Urbaez because of their support for the Union

Section 8(a)(3) of the Act prohibits employers from discriminating "in regard to hire or tenure of employment or any term or condition of employment to…discourage membership in a labor organization.[5] 29 U.S.C. § 158(a)(3). Accordingly, § 8(a)(3) makes it an unfair labor practice

[5] A violation of § 8(a)(3) produces a "derivative" violation of § 8(a)(1) . *See e.g., Metro. Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983).

for an employer to discharge employees for antiunion reasons. *See NLRB v. Transp. Mgmt. Corp.*, 462 U.S. 393, 397-98 (1983); *NLRB v. G&T Terminal Packaging Co.*, 246 F.3d 103, 115-16 (2d Cir. 2001); *NLRB v. Sprain Brook Manor Nursing Home, LLC*, 630 Fed App'x 69, 71 (2d Cir. 2015). Once it is shown that the employer's opposition to union activity was a motivating factor in its decision to take adverse action against an employee, the employer will be found to have violated the Act, unless the employer demonstrates, as an affirmative defense, that it would have taken the same action even absent the employee's union activity. *See Transp. Mgmt. Corp.*, 462 U.S. at 400-04; *G&T Terminal*, 246 F.3d at 116.

Here, both Guance and Urbaez openly demonstrated their support for the Union by speaking to union representatives on the street near the Bronx facility and by admitting to managers that they had signed Union authorization cards. Thus, Arbor had direct knowledge of their union activity. (A 27-31, 35, 79-80.) Arbor demonstrated animus toward that union activity by interrogating and threatening Guance, Urbaez, and their fellow employees, as well as engaging in surveillance of their union activities by videotaping and watching what happened as union representatives talked with employees. (A 33-34, 85-86, 88, 90.)

Arbor asserted that it discharged Guance because he lied about the accident but Arbor did not fire the driver who caused the accident, concocted the story, and made a false police report about it. *See NLRB v. Future Ambulette, Inc.*, 903 F.2d 140, 143 (2d Cir. 1990) (employer's failure to discipline other employees for similar or more egregious misconduct supports inference of unlawful motive rather than good-faith business judgment). Arbor's proffered reasons for discharging Urbaez have ranged from Urbaez not accomplishing his job and not showing respect to Vallejo to refusing to do his work and having a negative attitude and being disrespectful to coworkers. However, prior to his discharge, Arbor never disciplined Urbaez for any of those reasons and had consistently approved overtime for Urbaez to complete his repair work.[6] Any issues that Arbor had with Urbaez's alleged slowness or work performance only arose after Arbor became aware of his union activity. *See, e.g., NLRB v. Fermont, Div. of Dynamics Corp. of America*, 928 F.2d 609, 612-14 (2d Cir. 1991) (issuing disciplinary warnings after union election for pre-election conduct unlawful).

[6] In the spring of 2016, Arbor suspended Urbaez for refusing a directive when he refused to go pick up an automotive part at Vallejo's request. Urbaez refused because Arbor did not need the part and he did not want to be responsible for an unnecessary purchase. (A 110-11, 173-74.)

The district court considered the termination of Guance and Urbaez to be "a close question" but found reasonable cause to believe that they were unlawfully terminated. (A 318.) Given the repeated threats of discharge and the evidence of disparate treatment of Guance and Urbaez, however, the record establishes more than a close question, but strong cause to believe that Arbor discharged Guance and Urbaez "in retaliation for union activities" in violation of § 8(a)(1) and (3) of the Act. Thus, the court properly found reasonable cause. (A 318.)

C. The District Court Correctly Ordered Arbor to Cease and Desist from its Unlawful Conduct

Given the reasonable cause to believe that Arbor committed numerous violations, including interrogations, threats, surveillance, and discharge of employees, the district court correctly concluded that it was "just and proper" to enjoin Arbor from further violations. (A 317-18.) As the court noted, Arbor's misconduct "likely had a chilling effect on unionization efforts among its workforce," and enjoining Arbor from the unlawful conduct is necessary to "preserve the status quo with respect to the workforce's predisposition in favor of (or against) unionization." (A 318.)

The district court's conclusion is supported by the evidence that Arbor's violations eventually led employees to stop talking to union

representatives and express fear of retaliation, preventing a representation election. The court's order enjoining further violations is thus necessary to assure employees that they can exercise their § 7 rights without further coercion and is a clearly appropriate exercise of the court's discretion. *See, e.g., Sharp v. Webco Indus., Inc.*, 225 F.3d 1130, 1133, 1135 (10th Cir. 2000) (order to cease and desist from alleged violations was proper additional relief to preserve Board's ultimate remedial authority); *Schaub v. West Michigan Plumbing & Heating Inc.*, 250 F.3d 952, 970-71 (6th Cir. 2001) (order to cease and desist from further discrimination not an abuse of discretion); *NLRB v. Electro-Voice, Inc.*, 83 F.3d 1559, 1575 (7th Cir. 1996) (enjoining employer from committing further unfair labor practices).

D. The District Court Abused Its Discretion by Denying Interim Reinstatement

Despite recognizing that Arbor's misconduct threatened likely irreparable harm to employee free choice regarding unionization and required injunctive relief, the district court abused its discretion in failing to acknowledge that that irreparable harm could not be effectively prevented without interim offers of reinstatement to Guance and Urbaez. Given the recognized chilling impact of the discharge of union supporters during an organizing campaign, the "cease and desist" order was not enough to ensure

that employees could exercise their right to learn about and freely choose whether to seek union representation.

1. Arbor's discharge of union supporters threatens irreparable harm to the employees' rights, the Union's organizational campaign, and the Board's remedial effectiveness

In this Court, "injunctive relief under § 10(j) is just and proper when it is necessary to prevent irreparable harm or to preserve the status quo." *Hoffman v. Inn Credible Caterers, Ltd.*, 247 F.3d 360, 368 (2d Cir. 2001). The "principal purpose of a § 10(j) injunction is to guard against harm to the collective bargaining rights of employees." *Paulsen v. Remington Lodging & Hospitality, LLC*, 773 F.3d 462, 469 (2d Cir. 2014). The "appropriate test" for irreparable harm "is whether the employees' collective bargaining rights may be undermined by the…[asserted] unfair labor practices" and whether delay may undermine bargaining in the future. *Kreisberg v. HealthBridge Mgmt., LLC*, 732 F.3d 131, 142 (2d Cir. 2013) (quoting *Hoffman*, 247 F.3d at 368).

In the context of a union organizing campaign, protecting employees' collective-bargaining rights means protecting their free selection of collective bargaining representatives. This Court has long recognized that unlawful adverse employment actions, such as terminations, which threaten

to "nip" union organizing drives "in the bud," warrant injunctive relief, and reinstatement of the employees is necessary to avoid "serious adverse impact on employee interest in unionization." *Kaynard v. Palby Lingerie*, 625 F.2d 1047, 1052 (2d Cir. 1980). *See also Abbey's Transp. Servs., Inc. v. NLRB*, 837 F.2d 575, 576 (2d Cir. 1988) (discharge of union supporters will negatively affect employees who are "certain to be discouraged from supporting a union if they reasonably believe it will cost them their jobs") .

Otherwise, the remaining employees who "know what happened to the terminated employees [will] fear that it will happen to them." *Electro-Voice*, 83 F.3d at 1573. This fear of retaliation that inhibits employees from exercising their rights under the Act is "exactly the 'irreparable harm' contemplated by § 10(j) ." *Pye v. Excel Case Ready*, 238 F.3d 69, 74-75 (1st Cir. 2001) (ordering interim reinstatement of five employees). *Accord Remington Lodging*, 773 F.3d at 469, 471 (reversing district court and remanding with instructions to enter injunction ordering interim reinstatement of unlawfully discharged employee).

This harm to employee interest in unionization is irreparable because a subsequent Board order, in the ordinary course of lengthy administrative proceedings, cannot erase the chill that the employer's discrimination has on employee support for the union. *Pascarell v. Vibra Screw, Inc.*, 904 F.2d

874, 878-79, 81 (3d Cir. 1990) (chilling effect of retaliation against union activists cannot be undone by eventual Board order). Thus, the goal of an interim reinstatement order is "to avoid the serious risk of adverse employee interest in unionization" following unlawful terminations. *Gottfried v. Purity Sys., Inc.*, 707 F.Supp. 296, 302 (W.D. Mich. 1988) (citing *Palby Lingerie*, 625 F.2d at 1053).

Absent such an order, Arbor will have succeeded in its unlawful effort to "weaken severely, if not destroy, the power of the…employees to assert their collective bargaining rights." *Hoffmann*, 247 F.3d at 369. The longer that Arbor "is permitted to benefit from a state of affairs that its own wrongdoing has brought about, the less likely it is that a final order in the Board's favor will be able to redress the wrongs that have been done and to restore the status quo ante." *Bloedorn v. Francisco Foods, Inc.*, 276 F.3d 270, 300 (7th Cir. 2001).

Absent prompt injunctive relief to counteract that message, remaining employees, especially those who were undecided about organizing, will not participate in the campaign or support the union after seeing what happened to other supporters. *Pye*, 238 F.3d at 74-75, 76; *Electro-Voice*, 83 F.3d at 1573, 1575. In those circumstances, no worker "in his right mind" will

"participate in a union campaign…." *Silverman v. Whittal & Shon, Inc.*, 125 LRRM 2150, 2151, 1986 WL 15735, *1 (S.D.NY. June 6, 1986).

Given the strong chilling message that unlawful discharges send, absent a reinstatement order, Arbor's message to employees remains inescapable and reinforces Arbor's unlawful threats: engaging in organizing activity will cost them their job, and neither the Board nor the Union can provide a timely remedy. With the discharged union supporters out of the workplace for the long term, the chilling effect remains strong, even with the court's "cease and desist" order. In sum, a reinstatement order is necessary to fully dissipate the employees' fear of engaging in union activity and to prevent Arbor from achieving its goal of intimidating its employees into forgoing their right to learn about the Union and its benefits from union representatives, and proceed to an election if they choose.

Here, the record evidence establishes that Guance's and Urbaez's unlawful discharges had this predictable adverse effect on employees, consistent with this applicable § 10(j) precedent, and amply supported the need for an order requiring their interim reinstatement. After their terminations—which came at the campaign's infancy—the union organizing efforts dismantled. Employees became reluctant to be seen with union representatives, knowing that management was watching them. Several

employees told the Union that they were afraid to be involved with the Union for fear of losing their jobs. (A 264.) Arbor's unlawful behavior created a "silent intimidation…undermin[ing] the [U]nion's campaign." *Reynolds v. Curley Printing Co.*, 247 F.Supp. 317, 323-24 (M.D. Tenn. 1965).

With union support strangled, the Board's eventual final order will be an "empty formality." *Angle v. Sacks*, 382 F.2d 655, 660 (10th Cir. 1967); *see Pascarell*, 904 F.2d at 878–79, 881 (chilling effect of retaliation against union activists cannot be undone by eventual Board order). Because fear of retaliation may completely extinguish employee willingness to support the Union by the time a Board order issues, Guance's and Urbaez's interim reinstatement is necessary to erase the chill before it is too late to prevent complete remedial failure. *See Palby Lingerie*, 625 F.2d at 1053; *see also Pye*, 238 F.3d at 75. Thus, interim reinstatement of Guance and Urbaez to their previous positions is just and proper to prevent harm to the employees, the Union's status, the public interest, and the Board's remedial power.

2. The district court ignored relevant precedent and erroneously minimized the evidence of harm

The district court abused its discretion by ignoring the well-established precedent, discussed above, recognizing that discharges of union

supporters cause predictable, likely irreparable harm to employee willingness to engage in union activity. The court also abused its discretion in minimizing the record evidence of harm and failing to recognize that the same evidence it relied on to enjoin Arbor from further interrogating, surveilling, threatening, and discharging employees also supports the interim reinstatement of Guance and Urbaez.

The district court found that there was "little evidence" that the discharges of Guance and Urbaez "did anything to chill unionization efforts" or that other employees connected the discharges to their union support. (A 318.) The court's finding is inconsistent with applicable precedent and the record evidence. As discussed above, this Court and others have recognized the inherent chilling impact of the discharge of union supporters. *See Remington Lodging*, 773 F.3d at 469; *Pye*, 238 F.3d at 75; *Electro-Voice*, 83 F.3d at 1572; *Eisenberg v. Wellington Hall Nursing Home, Inc.*, 651 F.2d 902, 906-07 (3d Cir. 1981). Yet, without discussing or applying this precedent, the district court concluded that some quantum of evidence more than what was present here is required before interim reinstatement is just and proper. The district court was simply wrong. This Court, and others, have held interim reinstatement to be appropriate without requiring evidence of actual, realized harm. *See Pye*, 238 F.3d at 76 ("cessation [of

union activity] may be sufficient to support a finding of irreparable harm to the collective bargaining process, even absent evidence of actual fear of retaliation from non-discharged employees"). *Accord Remington Lodging*, 773 F.3d at 470-71.

Moreover, the district court's characterization of the evidence of harm as being too "little" (A 318) overlooks the record evidence showing that the discharges had a significant chilling effect on remaining employees. The evidence establishes that in the beginning, on multiple occasions between June and August 2016, employees were willing to stop and speak to union representatives and accept union cards outside Arbor's facilities. (A 19, 22, 24,74, 119-24, 127.) But after the discharges, as the Union was attempting to prepare for a representation election in January 2017, most employees refused to speak with the union agent. (A 256, 264.) Some employees stated that they were afraid of being identified as union supporters and of losing their jobs if they got involved with the Union. (A 264.) The fact that the Union attempted to continue the campaign after the discharges of Guance and Urbaez while not gauging the loss of support among employees until several months later, when it was preparing for a representation election, does not negate that the discharges had a likely chilling impact. On the contrary, the comments about employees being afraid of getting

identified and reported as union supporters and losing their jobs because of that, tie the loss of support to the earlier violations, including the surveillance, the threats, and the discharges.

Indeed, as discussed above, the district court correctly found that the interrogations, surveillance, and threats, all of which happened around the same time as the discharges, adversely impacted the employees' union efforts. Yet, inexplicably, the court concluded that the discharges, which turned the contemporaneous threats made to Guance, Urbaez, and their coworkers into an accomplished fact, did not contribute to that chilling impact.

The court's requirement that there be specific evidence that employees connected the discharges to Guance's and Urbaez's union support similarly lacks legal support. *See Ahearn v. Jackson Hosp. Corp.*, 351 F.3d 226, 240 (6th Cir. 2003) (noting that "terminations were inherently chilling" in response to argument that no proof was submitted to show actual chilling effect). More critically, even if such a connection were required, there is sufficient evidence in the record to establish that employees made that connection. The same day that Guance, in view of all present, spoke to union representatives outside Arbor's facility and accepted a union card, dispatch manager Vega impliedly threatened him and a group of his

coworkers with adverse consequences if they signed a card. (A 33.) Similarly, Urbaez was part of a group of employees that manager Martinez threatened with discharge. (A 88-90.) The fact that, just a few months after Arbor discharged two employees it had openly threatened, other employees stated that they were afraid of losing their jobs, is a strong indication that employees connected the discharges to union support.

The district court also misapprehended the harm from the discharges by relying on the fact that Guance and Urbaez, although union supporters, were not actively involved in the campaign as union organizers or that they did not recruit other employees. (A 318.) However, this Court has never required that the unlawfully discharged employees be organizers, engage in recruitment efforts, or be more outspoken in favor of the Union than their fellow employees. Interim reinstatement is appropriate and necessary when discharges send a chilling message to other employees about the consequences of union activity and affect the level of union support, as they did here, whether the employees are merely union supporters or simply perceived as such. *See Remington Lodging*, 773 F.3d at 466 (reinstated employee Loiacono was not a unit member but perceived to be pro-union when she criticized employer literature about compensation); *Pye*, 238 F.3d at 72 (employee reinstated under §10(j) put union sticker on his car and may

have attended a union meeting); *Silverman v. J.R.L. Food Corp.*, 196 F.3d 334, 336 (2d Cir. 1999) (employee reinstated under §10(j) signed a union card with no mention of other union activity).

3. The district court abused its discretion in balancing the harms against interim reinstatement

The district court abused its discretion in balancing the harms against interim reinstatement. Returning Guance and Urbaez to the workplace until a Board order issues is a minimal obligation for which Arbor has not shown demonstrable harm. Both are experienced employees who, until their discharges, had good disciplinary records. An order requiring interim reinstatement will allow Arbor to benefit from their experienced labor and does not restrict Arbor's ability to discipline them non-discriminatorily or to lawfully enforce work rules. *See Eisenberg*, 651 F.2d 902 at 906 (decree ordering interim reinstatement of employees does not preclude imposition of lawful employer discipline).

The district court, however, wrongly concluded that reinstating the employees would be a significant hardship to Arbor, relying on the same evidence that Arbor produced to justify their discharges.[7] (A 319.)

[7] The district court's finding of harm to Arbor is therefore inconsistent with its correct finding that there is reasonable cause to believe that their discharges were unlawful. Given the strong cause to believe that Arbor's

Specifically, the court noted that Guance lied about the truck accident and was present for the filing of a false police report. However serious the matter of filing such a false report, Arbor chose not to terminate the driver who actually made that report; Guance himself did not give any false statement to the police. Thus, there can be no meaningful hardship to Arbor from his reinstatement where Arbor tolerated similar or arguably worse behavior from another employee without any apparent harm.

With respect to Urbaez, the court stated that Arbor presented evidence that Urbaez's poor work performance had a negative effect on company productivity. Yet, prior to the union activity and his discharge, Urbaez had no disciplinary record for poor work performance or productivity issues. Arbor's claim of harm is therefore unpersuasive because it cannot show "that the misconduct…is not conduct of a sort that it has tolerated in the past." *Axelson, Inc.*, 285 NLRB 862, 857 n. 8 (1987). If Urbaez indeed had a history of productivity issues, Arbor had previously "tolerated" any asserted flaws in Urbaez's work by granting him overtime and not issuing any prior discipline related to his productivity or "attitude." Accordingly,

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stated reasons for their discharge are pretextual, there is little weight to Arbor's claim of harm.

the district court erroneously concluded that interim reinstatement would impose a significant hardship on Arbor.

In sum, there is no meaningful hardship to Arbor from interim reinstatement of Guance and Urbaez that outweighs the harm that their discharges pose to employees' organizing rights, the Union's level of support, and the Board's ability to issue an effective final remedy in due course.

4. The public interest favors interim reinstatement

The public interest is best served by ordering interim reinstatement. In §10(j) cases, "the public interest is to ensure that an unfair labor practice will not succeed because the Board takes too long to investigate and adjudicate the charge." *Frankl v. HTH Corp.*, 650 F.3d 1334, 1365-66 (9th Cir. 2011) (citations omitted). And, "very often, the most effective way to protect the Board's ability to…restore the status quo will be for the court itself to order a return to the status quo." *Id.* *Accord Paulsen v. All Am. School Bus Corp.*, 967 F. Supp. 2d 630, 645-46 (E.D.N. Y. 2013) (public interest best served by granting injunction and restoring lawful status quo). Under § 10(j), the status quo is that which existed before the onset of the unfair labor practices. *Seeler v. Trading Port, Inc.*, 517 F.2d 33, 38 (2d Cir. 1975), citing S. Rep. No. 105, 80th Cong., 1st Sess., 8 (1947), cited in

Legislative History of the Labor Management Relations Act, 1947, 414 (1948) . A temporary injunction serves the public interest where it is necessary to protect employees' right to engage in § 7 activity, safeguard the collective-bargaining process toward which the employees were working, and preserve the Board's remedial power. *See Aguayo v. Tomco Carburetor Co.*, 853 F.2d 744, 749 (9th Cir. 1988) ("given the public interest in maintaining the integrity of the collective bargaining process," it was abuse of discretion for district court to fail to reinstate employees discharged for union organizing activities), *overruled on other grounds*, *Miller v. Cal. Pac. Med. Ctr.*, 19 F.3d 449, 460 (9th Cir. 1994); *Bloedorn*, 276 F.3d at 300; *Fleischut v. Nixon Detroit Diesel, Inc.*, 859 F.2d 26, 30 (6th Cir. 1988).

Here the interim relief of reinstatement will ensure that Arbor does not succeed in its attempt to thwart the employees' protected rights. Given the strong cause to believe that the employees were unlawfully discharged for their union support, as well as the showing of irreparable harm, the requested relief best serves the public interest in preserving the Board's remedial power.

VIII. CONCLUSION

For the foregoing reasons, the Director respectfully requests that this Court reverse the part of the district court's order denying injunctive relief and direct the issuance of an interim reinstatement order.

Respectfully submitted,

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Dated at Washington, DC
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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of words set forth in Fed. R. App. P. 28.1.1(b), because this brief contains 8,511 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared using Microsoft Office Word 2013 in proportionally spaced, 14-point Times New Roman.

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February 23, 2018

Addendum

STATUTORY ADDENDUM

NATIONAL LABOR RELATIONS ACT, 29 U.S.C. § 151 et. seq.

Section 7 (29 U.S.C. § 157):

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

Section 8(a) (29 U.S.C. § 158(a)):

It shall be an unfair labor practice for an employer –
(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 [section 157 of this title];

* * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . .

Section 10(j) (29 U.S.C. § 160(j)):

The Board shall have power, upon issuance of a complaint as provided in subsection (b) of this section charging that any person has engaged in or is engaging in an unfair labor practice, to petition any United States district court, within any district wherein the unfair labor practice in question is alleged to have occurred or wherein such person resides or transacts business, for appropriate temporary relief or restraining order. Upon the filing of any such petition the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper.

CERTIFICATE OF SERVICE

I hereby certify that on February 23, 2018, I filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Second Circuit. I further certify that the foregoing document was served on all those parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not by serving a true and correct copy at the addresses listed below:

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